

The viability of the United Nations approach to economic and social human rights in a globalized economy

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As part of my class on international cooperation, I travelled to Geneva with 26 students in May 1998 to better understand the work of various international organizations (IOs), national missions to the UN and non-governmental organizations (NGOs). During our meetings a series of incidents brought into sharp focus the current UN deadlock between the North and the South over economic human rights and development.

This impasse was strikingly visible in the approach to the internationally ratified 'right to development'.¹ The human rights officer of the Pakistani Mission to the UN told us that the right to development was the most important human right. As a priority, his government will fight for the right to development to be included as part of the International Bill of Human Rights.² His stress on the critical importance to poor countries of development rights brought back the oft-quoted words of Leopold Senghor, former president of Senegal, 'human rights begin with breakfast'.³ Two days later at the United States Mission to the UN, the American human rights officer declared that the right to development was simply rhetoric and held no real meaning. The US position was that this claimed 'right' was impossible to implement and was pushed by the less developed countries (LDCs) to pressure the developed countries into increasing aid levels. The US acceptance of the validity of development as a human right at the 1993 Vienna World Conference on Human Rights did not appear to change US policy. Upon leaving these two meetings, it was hard to see how even a dialogue could move forward given these diametrically opposed positions.

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¹ See William F. Felice, 'The morality of the depths: the right to development as an emerging principle of international law', in *Taking suffering seriously: the importance of collective human rights* (Albany: State University of New York Press, 1996), pp. 69-90.

² The International Bill of Human Rights encompasses the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

³ Julia Hausermann, 'The realization and implementation of economic, social and cultural rights', in Ralph Beddard and Dilys M. Hill, eds, *Economic, social and cultural rights: progress and achievement* (New York: St Martin's Press, 1992), p. 49.

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Conflicts between the North and the South also surfaced in meetings with the World Trade Organization (WTO), the Office of the US Trade Representative (USTR) to the WTO and the World Wide Fund for Nature (WWF). Prior to these meetings, a ruling by the WTO struck down US legal protection for endangered sea turtles. The Eckerd College students I travelled with were very environmentally conscious and they were concerned not only about this ruling but also about how intertwined trade and environmental policies have become. According to the WWF, sea turtles are an internationally protected species endangered around the world by the loss of their habitat. They became an international trade issue with the advent of mechanized shrimp trawling, which by 1990 had caused some 100,000 adult turtles to drown each year in nets. This loss is easily preventable. A turtle excluder device proved effective in keeping turtles out of the shrimp nets. The device is inexpensive, easy to install and standard practice in more than a dozen countries. The US not only required its domestic shrimp industry to use turtle excluders, but applied identical standards to countries selling shrimp in US markets. In response, Malaysia, Thailand, India and Pakistan filed a complaint to the WTO claiming the requirement deprived them of market access guaranteed under most-favoured-nation status. The WTO agreed with the four Asian countries, deciding against the United States. The US must now open its markets to countries whose fishing methods threaten sea turtles.⁴

The WTO representative characterized US policy as imperialistic. She claimed that the US had no right to impose its environmental standards on the rest of the world. She sided with the shrimp fishermen in Malaysia whose jobs, she claimed, were threatened by turtle excluder devices. The US Trade Representative said that the US will appeal against this decision, and referred us to President Clinton's address to the WTO the previous week. President Clinton had declared 'we must do more to harmonize our goal of increasing trade with our goal of improving the environment and working conditions ... International trade rules must permit sovereign nations to exercise their right to set protective standards for health, safety and the environment and biodiversity. Nations have a right to pursue those protections—even when they are stronger than international norms.'⁵

These differences towards economic rights and development between the developed and less developed countries demonstrate the difficulty of achieving a global understanding of economic and social human rights. The US not only undermines the right to development, but refuses to ratify the International Covenant on Economic, Social and Cultural Rights (ICESCR). Many less developed countries continue to see not only environmental regulations, but also trade-labour linkages, as impediments to their economic growth. In 1996 developing countries succeeded in derailing the social clause movement— in

⁴ Kathryn S. Fuller, 'Balancing trade and sea turtles', *International Herald Tribune*, 16–17 May 1998.

⁵ Address by President Clinton to the World Trade Organization, Geneva, Switzerland, 18 May 1998.

other words the attempt to link adherence to basic labour rights with membership in the WTO (see page 561 below). LDC's argued that the social clause would infringe on their sovereignty and deny them a legitimate comparative advantage. This opposition allowed the WTO to declare that it would not pursue the trade-labour linkage any further.

Economic and social human rights thus exist within a global framework of discord, fragmentation and dissension. Can the historical legacy of exploitation, and subsequent mistrust, between the North and the South be overcome? Are workers' interests in developed and developing countries furthered by the enforcement of international economic and social standards?

This article examines the following questions:

- How has the UN approached economic and social rights? Has the international community through the UN established a core of fundamental economic and social rights?
- How are issues of gender incorporated into the UN approach to economic and social rights and development?
- How are the economic and social rights of minority groups incorporated into the UN human rights and development agenda?
- Can the UN human rights system address structural violence? The less developed countries often face economic deprivation caused not by state action or inaction but by the global economic system itself. In many key respects states appear to be losing their capacity to regulate their economies and labour markets effectively. In this era of economic globalization, how do national governments protect the economic and social human rights of their citizens?

The UN's approach to economic and social rights

The UN approaches economic and social rights through a framework of legal positivism, i.e. rights are defined by what states have actually agreed to through consent.⁶ Consent is most often demonstrated either through written agreement (treaty, convention and so on) or through customary practice. A legal positivist looks to state treaties, custom and general principles of international law as the primary sources of international economic and social rights. These socially constructed legal principles of rights and obligations reflect the bias of the governing elites of global politics. For the most part, the poor and dispossessed do not have a voice in the formation of the international legal rights that are often proclaimed in their name.

Women have also traditionally been left out of the formation of international law. The distinct needs and rights of women are not reflected in most

⁶ For a comprehensive overview of the UN's approach to economic and social rights see: Scott Leckie, 'Another step towards indivisibility: identifying the key features of violations of economic, social and cultural rights', *Human Rights Quarterly* 20, 1998.

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international legal instruments. The private sphere where women often face both domestic violence and economic exploitation has not been adequately addressed through existing legal norms. The specific needs of women in relation to the biological functions of raising and suckling children have also been inadequately addressed. The issue here is not just equality with men, but the distinct economic and social rights of women.

Conventions on economic and social rights have been developed by the UN-affiliated International Labour Organization (ILO). The ILO has adopted 177 conventions establishing labour standards on a wide range of issues from the most general (such as freedom of association) to the specific (such as road transport). The ILO has prioritized these standards and established the following basic human rights conventions: freedom of association and collective bargaining, abolition of forced labour, equal remuneration and non-discrimination in employment. Virginia Leary points out that these are the most widely ratified of ILO conventions and are those to which the ILO devotes most of its attention. The US has only ratified one: Convention No. 105 on the Abolition of Forced Labour. To many scholars, the ILO's basic human rights conventions form the corpus of minimum international labour standards or internationally recognized worker rights.⁷

The UN also has a corpus of international treaties addressing economic and social rights. The distinction between the two types of rights is commonly seen as follows:

Social rights are those necessary for an adequate standard of living (Universal Declaration of Human Rights (UDHR), Article 25; ICESCR, Article 11; Convention

Social and Cultural Rights (hereinafter the Limburg Principles) have been extremely useful to human rights advocates, lawyers and diplomats attempting to interpret the legal duties of states under this convention.¹¹ The Limburg Principles comprehensively summarized the state of international law in relation to economic, social and culture rights as of 1986.

On the tenth anniversary of the Limburg Principles a group of experts again met in Maastricht to elaborate on the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies. This 1997 meeting resulted in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (hereinafter the Maastricht Guidelines). The Maastricht Guidelines reflect the evolution of international law since 1986 and clearly demonstrate the emerging consensus within the legal community as to state responsibility and accountability under the ICESCR.¹²

These principles and guidelines are intended to outline what a state must do to meet the obligations and duties that flow from the economic, social and cultural rights articulated in the ICESCR, i.e. the right to work, the right to housing, the right to health care, and so on. The experts were able to draw on the work of many others including the constructive role played by the UN Committee on Economic, Social and Cultural Rights (CESCR) and various UN conferences and reports.¹³ As a result, the Maastricht Guidelines are a very clear summary of the current understanding of economic and social rights in international law.

Key principles found in the Maastricht Guidelines include:

1. The state remains the primary actor responsible for implementing international economic and social rights. The guidelines claim to recognize the global forces at work at the end of the millennium weakening the state's ability to control their economic destiny. However, 'as a matter of international law, the state remains ultimately responsible for guaranteeing the realization of these rights'.¹⁴ The UN's approach is to hold governments accountable for the provision of basic social services, including health care, employment and education.

¹¹ The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN ESCOR, Commission on Human Rights, 43rd Session, Agenda Item 8, UN Doc. E/CN.4/1987/17/Annex (1987), reprinted in 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly* 9:2, 1987, pp. 122-35.

¹² 'The Maastricht guidelines on violations of economic, social and cultural rights', *Human Rights Quarterly* 20: 3, 1998, pp. 691-704.

¹³ See Danilo Turk, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The full realization of economic, social and cultural rights (final report)*, UN ESCOR, Commission on Human Rights, 48th Session, Agenda Item 8, UN Doc. E/CN.4/Sub.2/1992/16 (1992); *Vienna declaration and programme of action*, UN GAOR, World Conference on Human Rights, 48th Session, 22nd plenary meeting, UN Doc. A/CONF.157/24 (1993); *UN seminar on appropriate indicators to measure achievements in the progressive realization of economic, social and cultural rights*, UN GAOR, World Conference on Human Rights, 4th session, provisional agenda item 6, UN Doc. A/CONF.157/PC/73 (1993).

¹⁴ 'Maastricht guidelines', p. 692.

2. States have obligations to respect, protect and fulfil. This three-part approach to explaining economic and social rights was first formulated by Henry Shue.¹⁵ Asbjorn Eide, as Special Rapporteur on the right to food, further developed these categories.¹⁶ 'The obligation to *respect* requires states to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the state engages in arbitrary forced evictions. The obligation to *protect* requires states to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to *fulfil* requires states to take appropriate legislative, administrative, budgetary, judicial and other measures toward the full realization of such rights. Thus, the failure of states to provide essential primary health care to those in need may amount to a violation.'¹⁷

The guidelines outline violations through acts of commission (direct action by states) and omission (failure of state to act). Acts of commission include the formal removal of legislation and/or funding necessary for the continued enjoyment of an economic or social right, while violations of omission include the failure to enforce legislation designed to implement provisions of the Covenant.

3. States are allowed a 'margin of discretion in selecting the means for implementing their respective obligations'. However, 'certain steps must be taken immediately and others as soon as possible'. A state violates the Covenant when it fails to satisfy what the CESCR refers to as 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights ... Thus, for example, a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing or of the most basic forms of education is, prima facie, violating the Covenant.' Resource scarcity does not relieve the state of these minimum obligations.¹⁸
4. States are required to ensure that private entities or individuals, including transnational corporations within their jurisdiction, do not deprive individuals of social or economic rights. 'States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors.'¹⁹
5. Concerning issues of gender: 'Discrimination against women in relation to the rights recognized in the Covenant, is understood in light of the standard of equality for women under the Convention on the Elimination of All

¹⁵ Henry Shue, *Basic rights: subsistence, affluence, and US foreign policy* (Princeton, NJ: Princeton University Press, 1980).

¹⁶ Center for Human Rights, *Right to adequate food as a human right*, UN Doc. E/CN.4/Sub.2/1987/23, UN Sales No. E.89.XIV.2 (1989).

¹⁷ 'Maastricht guidelines', p. 693.

¹⁸ *Ibid.*, p. 694.

¹⁹ *Ibid.*, p. 697.

Forms of Discrimination Against Women. That standard requires the elimination of all forms of discrimination against women including gender discrimination arising out of social, cultural and other structural disadvantages.²⁰

CESCR

The UN CESCR has been described as 'having one of the most developed and potentially effective reporting mechanisms of all the human rights supervisory bodies'.²¹ This was accidental. The ICESCR differs from the International Covenant on Civil and Political Rights (ICCPR) in not establishing an independent group of experts to supervise implementation of the Covenant's provisions. Instead the UN's Economic and Social Council (ECOSOC), a body of governmental representatives, was charged with implementation responsibility.

In the late 1970s ECOSOC set up a Sessional Working Group of governmental delegates to help with these responsibilities. The Working Group was a failure. In 1987 ECOSOC replaced it with a body of human rights experts operating in their personal capacity, the CESCR. The CESCR thus began from a weaker position than its counterpart the Human Rights Committee (HRC). The CESCR's existence depends upon the continued support of ECOSOC. Theoretically, if CESCR decisions upset the members of ECOSOC, its continued existence could be jeopardized. The HRC, on the other hand, exists by legal statute; it is a part of the ICCPR.²²

The CESCR is charged with monitoring the compliance of states parties to the ICESCR and is the principal UN body concerned with implementation of this Covenant. The composition of the CESCR is similar to the HRC with 18 independent experts elected by ECOSOC for four-year terms. Membership reflects an equitable geographic representation. States parties to ICESCR must submit an initial report within two years of ratification with subsequent reports required every five years. The reporting procedure involves a dialogue between the state party and the CESCR. The CESCR's examination of states parties' reports and their adoption of General Comments (see below) have been useful and innovative.²³

The ICESCR, which entered into force on 3 January 1976, is divided into five parts. The focus of Part I is the right to self-determination; Part II defines the general nature of states parties' obligations; Part III recognizes specific substantive rights; Part IV addresses international implementation; and Part V states specific legal provisions. Substantive provisions in Part III include rights to the following: an adequate standard of living, including food, clothing and

²⁰ 'Maastricht guidelines', p. 696.

²¹ Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: a perspective on its development* (Oxford: Clarendon, 1995), p. 103.

²² See Philip Alston, 'The Committee on Economic, Social and Cultural Rights', in Philip Alston, ed., *The United Nations and human rights* (New York: Oxford University Press, 1992), pp. 473-5.

²³ See Craven, *The International Covenant*.

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housing; physical and mental health; education; scientific and cultural life; work, just and favourable conditions of work; rest and leisure; social security; special protection for the family, mothers and children; and the right to form and join trade unions and to strike.

The challenge is to identify approaches to holding nations accountable to fulfil their obligations in the Covenant. The ICESCR demands that governments take all appropriate means and use the maximum of their available resources to fulfil these specific rights but gives no further guidance. Legislative and judicial remedies may be key. Overall economic and social development planning and intervention by the government, however, may be even more important.

ICCPR/HRC

As a point of comparison, it is useful to look at the reporting and implementation mechanisms established through the HRC. To overcome the politicization of human rights taking place in the Human Rights Commission, the HRC was established as an independent body of human rights experts. The hope was that these experts would prove to be more objective and less political in assessing human rights violations than the political appointments made by nation states to the Human Rights Commission. The HRC conducts public examinations of reports submitted by states parties. Its power was enhanced with the passage of the First Optional Protocol that allows for communications from individuals whose civil and political rights have been violated.²⁴

The UN High Commissioner for Human Rights reports that by the end of January 1998 there were 92 states parties to the Optional Protocol, and the HRC had considered some 800 complaints and adopted 270 decisions on their merits. The views of the HRC interpreting the substance of the ICCPR can be termed international human rights jurisprudence. National courts that now refer to the decisions and views of the HRC include the Supreme Court of Zimbabwe, the Judicial Committee of the Privy Council in London and the Constitutional Court of South Africa. This interplay between UN treaty bodies and national juridical organs is a very positive development. However, it is important to note that this advance must be put in context—only around one-half of UN member states are parties to the Protocol.²⁵

The individual complaint procedures developed through the Optional Protocol have been refined. According to Mercedes Morales, Human Rights Officer to the UN's High Commissioner for Human Rights in Geneva, after exhausting all domestic remedies individuals may submit complaints directly to the UN. The complaint can be of any length—from one page to hundreds. Once admissibility is determined, a summary of the case is submitted to a special rapporteur. The rapporteur reports to the HRC which ultimately makes all final

²⁴ The US has not ratified the Optional Protocol to the ICCPR.

²⁵ Office of the UN High Commissioner for Human Rights, *Human rights* 2, Spring 1998, p. 13.

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decisions. If the HRC finds that a violation has been committed, implementation of its decision through either compensation or a change in legislation must take place at the national level. Mercedes Morales reports that there is a 30–40 per cent compliance rate with the decisions of the HRC. This is a huge increase given that there was virtually 100 per cent noncompliance prior to the Optional Protocol procedures. The HRC's Annual Report lists those countries which do not reply to complaints.²⁶

Many states move to implement the views of the HRC by releasing political prisoners, awarding compensation to victims of human rights violations, reinstating individuals in the civil service, amending legislation considered incompatible with the provisions of the ICCPR or granting other remedies. All of these measures depend on the good will of the states parties. Colombia is the only state to pass enabling legislation 'which elevates the decisions of UN and regional human rights bodies to the level of enforceable judgements at the national level'.²⁷ Yet states do seem to listen to the HRC. The HRC and the Committee Against Torture have requested more than 200 interim measures of protection, e.g. in death penalty, extradition or deportation cases relating to stays of execution or to the temporary suspension of extradition. In all but five cases these requests have been respected.²⁸

ICESCR/CESCR

In contrast to the above complaint and enforcement system for civil and political rights, the implementation procedures of the ICESCR are still being developed. In theory, the 141 nations that had ratified the ICESCR as of March 1999 agreed that these economic and social claims had equal status to civil and political rights. In practice, these same nations have failed to take the necessary implementation steps (legislative, administrative or judicial) to make these claims equal to civil and political rights.

Furthermore, the ICESCR does not have a protocol equivalent to the ICCPR's First Optional Protocol. Thus, the CESCR may not receive formal complaints from individuals alleging violations of the ICESCR.

Louis Henkin believes that the differences in implementation procedures between the ICESCR and the ICCPR are significant. The ICCPR calls for full and immediate realization while the ICESCR only requires steps 'to the maximum of [a state's] available resources' with a view to progressively achieving the full realization of rights. He identifies a 'subtle but conscious and pervasive difference in tone and in the terms of legal prescription'. The ICCPR speaks of individual rights: 'Every human being has the inherent right to life ... No one shall be held in slavery ... Everyone shall have the right to hold opinions

²⁶ Interview with Mercedes Morales, Human Rights Officer, UN High Commissioner for Human Rights, 22 May 1998, Geneva, Switzerland.

²⁷ Office of the UN High Commissioner for Human Rights, *Human rights*, pp. 15–16.

²⁸ *Ibid.*, p. 16.

without interference.' The ICESCR, on the other hand, addresses states' action and obligation, not individual rights: 'The states-parties to the present covenant recognize the right to work ... the states ... undertake to ensure...the right of everyone to form trade unions ... the states ... recognize the right of everyone to social security ... to an adequate standard of living ... to education.' The economic, social and cultural rights in the Covenant are thus collective human rights and often depend on national planning for their success.²⁹

The CESCR functions to a large degree in a manner similar to the ICCPR HRC described above. Regular reports are submitted by states parties, deliberations are held and General Comments are published. The ICESCR seeks to achieve three principal objectives: '(1) development of the normative content of the rights recognized in the Covenant; (2) acting as a catalyst to state action in developing national benchmarks and devising appropriate mechanisms for establishing accountability, and providing means of vindication to aggrieved individuals and groups at the national level; and (3) holding states accountable at the international level through the examination of reports'.³⁰

According to Professor Matthew Craven, the largest problem facing the CESCR is the substance of the Covenant itself. The ICESCR suffers from excessive generality and lack of clear responsibility for supervision. It is this void that the CESCR has sought to fill. 'The breadth of subjects covered by the Covenant, combined with the lack of case law (whether national or international) in certain vital areas such as health and nutrition, mean that significant importance has to be placed upon the Committee's "creative" or "interpretative" functions.' Key in this effort is the drafting of General Comments to 'develop an understanding of the normative content' of economic and social rights.³¹

CESCR General Comments

General Comments provide 'an important mechanism for developing the jurisprudence of a committee in a way that is not possible in individual comments on state reports' which allows the CESCR to reach a consensus 'as to an interpretation of a specific provision without facing the difficult issue of addressing individual states'.³² The CESCR has 'used the General Comment as a means of developing a common understanding of the norms by establishing a prescriptive definition'. Craven notes that: 'Although the Committee's interpretations of the Covenant are not binding *per se*, it is undoubtedly true that they have considerable legal weight.'³³

²⁹ Louis Henkin, *The age of rights* (New York: Columbia University Press, 1990), p. 33.

³⁰ Henry J. Steiner and Philip Alston, *International human rights in context* (Oxford: Clarendon, 1996), p. 316.

³¹ Craven, *The International Covenant*, p. 104.

³² *Ibid.*, p. 90.

³³ *Ibid.*, p. 91.

General Comments (GC) of the CESCR cover the following subjects: GC1 (1989) Reporting by States Parties; GC2 (1990) International Technical Assistance Matters; GC3 (1990) The Nature of States Parties' Obligations; GC4 (1991) The Right to Adequate Housing; GC5 (1994) Persons with Disabilities; GC6 (1995) Rights of Older Persons; GC7 (1997) The Right to Adequate Housing; and GC8 (1997) The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights.

The first three GCs focus on refining and clarifying the state reporting system.³⁴ In GC3 the CESCR points to similarities between the ICESCR and the ICCPR, and suggests that the differences in implementation procedures between them are often exaggerated. While the ICESCR 'provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect'. The CESCR highlights two such obligations: the undertaking to guarantee that relevant rights 'will be exercised without discrimination' and the commitment 'to take steps' within a reasonably short time after the Covenant's entry into force to meet the recognized obligations. The CESCR continues:

... the fact that realization over time, or in other words progressively, is foreseen by the Covenant should not be misinterpreted as depriving the obligation of all meaningful content... It ... imposes an obligation to move as expeditiously and effectively as possible toward that goal...

[T]he Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party. Thus, for example, a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.³⁵

The CESCR attempt to establish a minimum threshold that should be achieved by all states at the earliest possible moment irrespective of their economic situation has appeal. It is then possible 'to speak of the widespread violation of economic, social and cultural rights in a technical legal sense instead of merely as a moral injunction'.³⁶ The burden of proof shifts to the state. It must prove that existing poverty, hopelessness and hunger are due to factors beyond its control and that it has mobilized its resources to meet the needs of the most vulnerable. The CESCR thus works to establish universal criteria through which states can be held accountable.

³⁴ See Bruno Simma, 'The implementation of the International Covenant on Economic, Social and Cultural Rights', in Franz Matscher, ed., *The implementation of Economic and Social Rights: national, international and comparative aspects* (Arlington, VA: N.P. Engel Verlag, 1991), pp. 88-94.

³⁵ Committee on Economic, Social and Cultural Rights, *General Comment No. 3*, UN Doc. E/1991/23, Annex III (1990).

³⁶ Craven, *The International Covenant*, p. 143.

However, this approach is not without its problems. It is exceedingly difficult to establish minimum thresholds and standards for economic and social rights at the international level. Are different criteria to be applied to resource-poor as opposed to resource-rich countries? Should the minimum level be raised in those countries that have the ability to meet a higher level of demand? Or will the CESCR only focus its attention on the basic needs of the developing states (and ignore the developed nations)? Furthermore, the CESCR will have to address the issue of responsibility. In a globalized economy, the impact of transnational actors (e.g. trading states, global corporations and banks, International Financial Institutions (IFIs), and so on) often have a direct impact on the well-being and/or destitution of a population. Mechanisms will have to be created to hold these state and non-state actors accountable to international human rights law.³⁷

Yet despite these problems, the CESCR has been clear about state responsibility. Either through legislation, judicial remedy or public policy, governments are required to take immediate and targeted steps towards the realization of economic and social rights. Governments have discretion to decide what steps to take but are required, at the very least, to assure minimum levels of basic rights to their citizens. The CESCR has paid particular attention to Article 11 of the ICESCR which recognizes 'the right of everyone to an adequate standard of living'. These rights, including the rights to food, housing and clothing, are of such critical importance because they are responsive to basic survival needs.

GC4 on the right to housing demonstrates the ways the CESCR has worked to clarify state responsibility to uphold Article 11. This GC significantly elaborates on and clarifies the content of the human right to housing in international law. The CESCR affirms that the right to housing applies to everyone and should 'be seen as the right to live somewhere in security, peace and dignity'. The CESCR identifies certain aspects of this right that must be taken into account: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy. It states: 'Regardless of the state of development of any country, there are certain steps which must be taken immediately.' The CESCR notes that certain actions require an abstention of the government from certain practices, while other actions require that priority be given to social groups living in unfavourable conditions. 'While appropriate means of achieving the full realization of the right to adequate housing will inevitably vary significantly from one state party to another, the Covenant clearly requires that each state party take whatever steps are necessary for that purpose. This will almost invariably require the adoption of a national housing strategy... Effective monitoring of the situation with respect to housing is another obligation of immediate effect... Measures designed to satisfy a state party's obligations in respect of the right to adequate housing may reflect whatever mix of public and private sector measures is considered appropriate.'³⁸

³⁷ See Craven, *The International Covenant*, p. 143.

³⁸ Committee on Economic, Social and Cultural Rights, *General Comment No. 4, the right to adequate housing (Art. 11(1) of the Covenant)* (Sixth session, 1991), compilation of general comments and general recommendations adopted by human rights treaty bodies, UN Doc. HRI/GEN/1/Rev.1 at 53 (1994).

The CESCR also considers 'that instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law'. And finally, the last paragraph of this General Comment addresses the impact of international finance on housing by calling for international housing assistance to be targeted to the housing needs of disadvantaged groups, and stating that IFIs' structural adjustment 'should ensure that such measures do not compromise the enjoyment of the right to adequate housing'.³⁹

The state clearly has a primary role in creating conditions whereby the right to housing becomes a reality. But the CESCR is clear that this role includes enabling strategies through which local community-based organizations and private citizens are encouraged to build houses themselves, e.g. the government must take positive steps to encourage private housing construction. '[P]rivate individuals and groups should be able to construct houses themselves without excessive conditions being placed upon them.'⁴⁰ But as Craven notes, this does not absolve states from responsibility for the provision of housing. For example, the CESCR criticized Chile following a sharp reduction in government low-cost housing projects. By placing the housing problem entirely in the hands of the private sector, one member commented that Chile was ignoring the position of the poor. The CESCR has directed similar criticisms toward Italy's shortage of low-income housing.⁴¹

The CESCR has criticized the Dominican Republic and the US and Panama for forced evictions. Public authorities in the Dominican Republic have adopted urban remodelling plans that have led to the eviction of nearly 15,000 families from their homes. The CESCR had the following comments about the US invasion of Panama in early 1990:

[T]he justification for the actions carried out by Panamanian and US forces in Tocumen, San-Miguelito and Panama Viego in early 1990, which affected more than 5,000 persons, was unacceptable under the terms of the Covenant as a ground for forcibly removing people from their homes. During the actions concerned, a large number of houses were demolished, in spite of the affected persons having lived in the area for more than two years. Additionally these evictions had not been accompanied by legal eviction orders. The committee was of the view that evictions carried out in this way not only infringed upon the right to adequate housing but also on the inhabitants' rights to privacy and security of the home.⁴²

GC5 deals with persons with disabilities. The CESCR notes that in their experience to date, states parties have devoted very little attention to this issue.

³⁹ CESCR *General Comment No. 4*

⁴⁰ Craven, *The International Covenant*, p. 336.

⁴¹ *Ibid.*, p. 336.

⁴² UN Doc.E/1992/23, UN ESCOR, Supp. No. 3, at 32, para. 135(c)(1992). Quote from Craven, *The International Covenant*, pp. 342-3.

States parties are called on 'to take appropriate measures, to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, flowing from their disability'. States must do more than merely abstain from taking measures that might have a negative impact on persons with disabilities. 'The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities...'⁴³

Of particular interest is the attention that the CESCR pays to the impact of market-based policies on the disabled. The CESCR calls for regulation of the private sphere to 'ensure equitable treatment of persons with disabilities. In a context in which arrangements for the provision of public services are increasingly being privatized and in which the free market is being relied on to an ever greater extent, it is essential that private employers, private suppliers of goods and services, and other non-public entities are subject to both nondiscrimination and equality norms in relation to persons with disabilities ... In the absence of government intervention there will always be instances in which the operation of the free market will produce unsatisfactory results for persons with disabilities, either individually or as a group, and in such circumstances it is incumbent on governments to step in and take appropriate measures to temper, complement, compensate for or override the results produced by market forces.'⁴⁴

The CESCR also notes the ways in which persons with disabilities are treated as 'genderless human beings', and the double discrimination faced by women with disabilities. 'Women with disabilities also have the right to protection and support in relation to motherhood and pregnancy.'⁴⁵

GC6 addresses the rights of older persons. The ICESCR does not specify precise rights for older persons, although Article 9 does recognize the right to old-age benefits by declaring 'the right of everyone to social security, including social insurance'. The CESCR 'notes that the great majority of states parties' reports continue to make little reference to this important issue. It therefore wishes to indicate that, in the future, it will insist that the situation of older persons in relation to each of the rights recognized in the Covenant should be adequately addressed in all reports.' The remaining substance of GC6 identifies the specific issues relevant to the economic, social and cultural rights of older persons.⁴⁶

In accordance with Article 3 of the Covenant, the CESCR calls on states parties to 'pay particular attention to older women who, because they have spent all or part of their lives caring for their families without engaging in a remunerated activity entitling them to an age-old pension, and who are also not

⁴³ Committee on Economic, Social and Cultural Rights, *General Comment No. 5, persons with disabilities* (Eleventh session, 1994), UN Doc E/C.12/1994/13 (1994).

⁴⁴ CESCR, *General Comment No. 5*.

⁴⁵ *Ibid.*

⁴⁶ Committee on Economic, Social and Cultural Rights, *General Comment No. 6, the economic, social and cultural rights of older persons* (Thirteenth session, 1995), UN Doc. E/C.12/1995/16/Rev.1 (1995), p. 4.

entitled to a widow's pension, are often in critical situations ... states parties should institute non-contributory old-age benefits or other assistance for all persons, regardless of their sex, who find themselves without resources on attaining an age specified in national legislation. Given their greater life expectancy and the fact that it is more often they who have no contributory pensions, women would be the principal beneficiaries.⁴⁷

GC6 further develops rights relating to work, social security, protection of the family, an adequate standard of living, education and culture as they relate to older persons.

The CESCR returns to the issue of housing and forced evictions in GC7, discussing the circumstances in which forced evictions are permissible and spelling out the types of protection required under the Covenant. 'The state itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions.' Furthermore, the CESCR calls on states to enact legislative measures against forced evictions which provide the greatest possible security of tenure to occupiers of houses and land and designate the circumstances under which evictions may be carried out. These measures must apply to forced evictions carried out by private persons or bodies as well as governmental actions.⁴⁸

The CESCR notes that 'Women in all groups are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless.'⁴⁹

Where forced evictions are justified, as in the case of persistent non-payment of rent, the relevant authorities must 'ensure that those evictions are carried out in a manner warranted by a law which is compatible with the Covenant...'⁵⁰ Evictions should not result in rendering individuals homeless or vulnerable to the violation of other human rights.⁵¹

The CESCR notes in GC8 the increasing frequency with which economic sanctions are being imposed internationally, regionally and unilaterally. These sanctions have a direct impact on the rights recognized in the ICESCR, including disruptions in the distribution of food and sanitation supplies. Since insufficient attention has been paid to the impact of these acts on vulnerable groups, the CESCR sees the need to 'inject a human rights dimension into deliberations on this issue'.⁵²

⁴⁷ CESCR, *General Comment No. 6*, pp. 4-5.

⁴⁸ Committee on Economic, Social and Cultural Rights, *General Comment No. 7, the right to adequate housing (Art. 11(1) of the Covenant) forced evictions*, UN Doc. E/C.12/1997/4 (1997), pp. 1-2.

⁴⁹ CESCR, *General Comment No. 7*, p. 3.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, p. 4.

⁵² Committee on Economic, Social and Cultural Rights, *General Comment No. 8 (1997), the relationship between economic sanctions and respect for economic, social and cultural rights*, UN Doc. E/C.12/1997/8 (12 December 1997), p. 2.

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The CDESCR outlines two sets of obligations. The first set relates to the affected state, which still 'must take steps "to the maximum of its available resources" to provide the greatest protection for the economic, social and cultural rights of each individual living within its jurisdiction'. The second set relates to the party or parties responsible for the imposition of sanctions. These parties must take into account the impact of their actions on the economic, social and cultural rights of the most vulnerable sectors of the population. Effective monitoring of the suffering caused by the sanctions must be implemented. Furthermore, action must be taken 'to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country'.⁵³

The UN and women's economic and social rights

Barbara Stark convincingly argues that the ICESCR is a 'postmodern feminist text' which privileges women over men and focuses on the substantive problems traditionally left to women. It is the 'marginalized half of international human rights law... The privileged half, the political and civil Covenant, replicates familiar hierarchies like "male over female" and "abstract over concrete practice."' Stark argues that the ICESCR 'privileges a postmodern proliferation of contextualized options over a modern quest for universal, abstract solutions'.⁵⁴

Examine Article 2.2, Article 3, and Article 10.2:

Article 2.2:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 3:

The States Parties to the present Covenant undertake to ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 10.2:

Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

These statements on banning gender discrimination can be interpreted to prohibit *de facto* as well as *de jure* discrimination. The state is then legally required to enact measures to remedy existing gender discrimination, for example by providing job training for women, child care and paid leave for childbirth and after.

⁵³ CDESCR, *General Comment No. 8*, p. 3.

⁵⁴ Barbara Stark, 'The "other" half of the International Bill of Rights as a postmodern feminist text', in Dorinda Dallmeyer, ed., *Reconceiving reality: women and international law* (Washington, DC: The American Society of International Law, 1993), pp. 20-21.

In other words, the ICESCR attempts to move the dialogue away from legal formal equality to actual substantive (or de facto) equality. Too often the extension of legal formal rights and protections against gender discrimination does not create the same equal opportunities for men and women. Unfortunately, all societies suffer structural inequalities, economic disparities and the marginalization of some groups. Standards that appear to be neutral may in reality reinforce a dominant patriarchal power structure that does not reflect the needs of the marginalized sex. Thus, de jure or formal equality may in fact reinforce inequality. Those arguing for de facto or substantive equality are concerned with outcomes and results. The starting point is the actual living conditions experienced by individuals and groups and the barriers to gender equality. This approach demands positive action to eliminate these structural obstacles blocking substantive equality.⁵⁵

Stark's argument is that the ICESCR requires states parties to take these positive actions. This Covenant recognizes the rights of every human being to be nurtured: 'to be cared for, housed, fed, clothed, healed, educated and made to feel part of a community. These "nurturing rights" are descriptions of "women's work."⁵⁶ The Covenant implies state responsibility in all these areas, which if assumed would imply a corresponding decrease of the burden on women.⁵⁷ The Covenant privileges concrete rights over abstract ones, in its focus on food, shelter and health care rather than on abstractions like liberty and equality.⁵⁸

The public-private dichotomy has been 'central to almost two centuries of feminist writing and political struggle'.⁵⁹ Women are relegated to the private sphere of home and family while men operate in the public arena of the workplace, politics, law, intellectual life and so on. In general terms, civil and political rights exist in the public arena, e.g. the administration of justice and the conduct of public political life, and can be considered 'men's rights'. Economic and social rights are found in the private arena, e.g. the family, health care, food, shelter, clothing and education, and can be considered 'women's rights'. There is thus a substantial overlap between women's work and the rights enunciated in the ICESCR. The resistance to incorporating norms and programmes to address the private sphere is demonstrated in the well developed procedures and institutions associated with civil and political rights compared to the weak (and often non-existent) policies and customs in the social realm. 'The juridical marginalization of social rights reflects the public-private dichotomy and the gendered nature of law.'⁶⁰

⁵⁵ See Hunt, *Reclaiming social rights*, p. 88.

⁵⁶ Stark, 'The "other" half', p. 27.

⁵⁷ Stark notes that there are countless examples of states relieving women of some burdens. For example, 'Sweden assures benefits for disabled children; Norway has established an ombudsman (sic) for children to deal with complaints of child abuse, physical conditions of children, child care, and schools; and Belarus provides subsidies for children's clothing.' Stark, 'The "other" half', p. 31.

⁵⁸ Stark, 'The "other" half', p. 33.

⁵⁹ Carole Pateman, 'Feminist critiques of the public/private dichotomy', in S. Benn and G. Gaus, eds, *Public and private in social life* (London: Croom Helm, 1983), p. 281.

⁶⁰ Hunt, *Reclaiming social rights*, p. 87.

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The ICESCR is not the only international human rights instrument concerned with women's economic and social rights. The UN approach has been to treat women's rights as a separate issue rather than as part of human rights in general. From the establishment of the Commission on the Status of Women in 1947 to the Fourth World Conference on Women in Beijing in 1995, women's rights have been treated as a specialized subset of human rights to be dealt with by distinct bodies. The International Convention on the Elimination of all Forms of Discrimination against Women (ICEDAW), which came into force in 1981, is of particular importance. The ICEDAW obligates states parties to eliminate discrimination against women. States parties are required to take measures, including legislation, to overcome discrimination in economic and social areas such as employment (Article 11), education (Article 10) and health care (Articles 12 and 14).⁶¹

As with the ICESCR, the ICEDAW also actively goes beyond formal equality and encompasses substantive equality. Examine Article 1, Article 4 (1), and Article 4(2):

Article 1:

the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 4(1):

advocates the adoption 'by states parties of temporary special measures aimed at accelerating de facto equality between men and women...'

Article 4(2):

advocates the adoption 'by states parties of special measures... aimed at protecting maternity...'

These articles clearly call for equality of result or substantive equality through special measures like affirmative action programmes and protection against indirect discrimination. This is the model of equality in international law. Men and women are to be treated equally. This standard is repeated throughout the Convention with the phrase 'on a basis of equality of men and women'. For example, Article 11, concerning employment, reads: 'State parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights...'

This phrase 'on a basis of equality of men and women' is repeated in all the economic and social areas discussed in the Women's Convention, including education (Article 10), employment (Article 11), health care (Article 12),

⁶¹ *International Convention on the Elimination of All Forms of Discrimination Against Women*. New York, 18 December 1979. Entered into force, 3 September 1981. UNGA Res. 34/180 (XXXIV), 34 UN GAOR, Supp. (No. 46) 194, UN Doc. A/34/830 (1979).

Economic and social human rights in a globalized economy

economic and social life (Article 13), women in rural areas (Article 14) and marriage and family relations (Article 16).⁶²

Hilary Charlesworth, Christine Chinkin and Shelley Wright argue that the underlining assumption of the Women's Convention's definition of discrimination is that women and men are the same. 'But the notion of both equality of opportunity and equality of result accept the general applicability of a male standard (except in special circumstances such as pregnancy) and promise a very limited form of equality: equality is defined as being like a man.'⁶³

Feminists criticize this approach for negating real differences and inequities and, furthermore, for ignoring real issues of power. 'Thus, equality is not freedom to be treated without regard to sex but freedom from systematic subordination because of sex.'⁶⁴ Sexism cannot be reduced to a legal aberration. Thus the ICEDAW, while recognizing discrimination as a legal issue, 'is premised on the notion of progress through good will, education and changing attitudes and does not promise any form of structural, social or economic change for women'.⁶⁵

The ICEDAW establishes the Committee on the Elimination of Discrimination against Women (CEDAW). The CEDAW consists of 23 members, elected by the states parties for four-year terms, who act in their individual capacities. The secretary-general is to provide the necessary facilities and staff to service the meetings of the CEDAW. The CEDAW's secretariat is based in Vienna, unlike all of the other treaty-based supervisory bodies, which are in Geneva. The CEDAW was initially limited by the ICEDAW to a single two-week annual meeting, but recently doubled its meeting time.

The reporting guidelines are found in Article 18 of the Women's Convention which, after the initial report, requires periodic reports to be submitted at least every four years and whenever the CEDAW requests them. As with the ICESCR, there is no complaint procedure, so these periodic reports are even more critical. On the basis of these reports the CEDAW adopts suggestions and recommendations concerning the matters reported to it.

As opposed to every other major institution of the international legal order, the CEDAW is staffed by women and not men. The CEDAW, more often than not, has been an all-female committee dealing with women's issues.⁶⁶ The state representatives reporting to the CEDAW have, for the most part, been male. Some observers argue that this has resulted in the proceedings becoming adversarial in nature, with the representatives feeling victimized and responding defensively.⁶⁷ In response to these concerns, ECOSOC called upon states

⁶² ICEDAW.

⁶³ Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist approaches to international law', *The American Journal of International Law* 85, 1991, pp. 631-2.

⁶⁴ *Ibid.*, p. 632.

⁶⁵ *Ibid.*, p. 634.

⁶⁶ There has been one male member, Mr Johan Nordenfelt of Sweden. Since 1984 CEDAW has been entirely female. See Roberta Jacobson, 'The Committee on the Elimination of Discrimination against Women', in Philip Alston, ed., *The United Nations and human rights* (New York: Oxford University Press, 1992), p. 459.

⁶⁷ Roberta Jacobson, 'CEDAW'.

parties to nominate both female and male experts for election to the CEDAW. It is instructive to note that ECOSOC did not call on states to correct the much more common dominance of men in all the other human rights supervisory bodies. The CEDAW rejected ECOSOC's recommendation on the grounds that it could potentially undermine its effectiveness. The CEDAW further called on ECOSOC to attend to equality of representation elsewhere before interfering with its membership.⁶⁸

In 1992, the CEDAW made a key 'general recommendation on violence against women'. Gender based violence is linked to discrimination and violations of human rights in public and private acts. Private activity includes: family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Andrew Clapham argues that this recommendation represents 'a giant leap forward in the conceptual thinking surrounding human rights theories and illustrates the crucial importance of collapsing the public-private boundary in the human rights field'.⁶⁹

The consequence, however, of separating women's rights from the other mainstream human rights bodies has been the potential marginalization of the CEDAW and the neglect of women's perspectives. It is impossible for the CEDAW, in a four-week annual meeting, to address the numerous patriarchal practices that globally subordinate women. In addition, the numerous reservations that states parties have put to the ICEDAW suggest that discrimination against women is still regarded as more acceptable than other practices.

Unfortunately, the economic and social rights of women are currently threatened by global forces that the UN system of rights protection seems unable to address. Women are too often the first to experience the negative consequences of the globalization process. The Women's Environment and Development Organization (WEDO) has traced the progress of national implementation of the Beijing Platform for Action since the UN's 1995 Fourth World Conference on Women in Beijing. WEDO finds that since the Beijing Conference: 'Women's access to equal opportunity and equal pay in work, labour and organizing rights have been severely eroded in the global economy.' The WEDO documents how women's economic and social rights are undermined in developed and underdeveloped countries.⁷⁰

In the developed world, public sector employment has been one of the few areas where women have had access to full-time and unionized jobs with decent pay and benefits. 'Women in public sectors have suffered massive layoffs and/or loss of benefits in Canada and the US, with women from ethnic and aboriginal minorities hit the worst.'⁷¹

⁶⁸ Charlesworth, Chinkin and Wright, 'Feminist approaches', p. 624.

⁶⁹ Andrew Clapham, *Human rights in the private sphere* (Oxford: Clarendon, 1993), p. 100.

⁷⁰ Women's Environment and Development Organization, *Mapping progress* (New York: WEDO, 1998), p. 13.

⁷¹ *Ibid.*

In the underdeveloped world, export-processing zones have mushroomed with a preponderance of female workers. 'This feminization of employment, often interpreted as a positive outcome of structural adjustment, is in fact a result of international and local demand for cheap and docile labour that can be used in low-skill, repetitive jobs in unsafe and insecure conditions without minimum guarantees.'⁷² National reports from Malaysia, the Republic of South Korea, the Philippines, India, Sri Lanka, Egypt and Mexico dramatically illustrate the gendered nature of economic globalization. Egypt, for example, adopted an Economic Reform and Structural Adjustment Programme in 1991 on the basis of agreements with the International Monetary Fund (IMF) and the World Bank (WB). According to the WEDO report, these programmes have accentuated poverty and reduced access to basic social services such as health and education. Women's overall unemployment in Egypt is now estimated to be around 60 per cent, which will increase with further privatization. Scarce public and private employment opportunities make these women prime candidates for exploitative working conditions and low wages.⁷³

The UN and the economic and social rights of minorities

The Committee on the Elimination of All Forms of Racial Discrimination (CERD) was established under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which came into force on 4 January 1969. Economic and social rights are covered extensively in the ICERD. Article 1(1) includes in the definition of racial discrimination bigotry which effectively nullifies economic and social human rights. CERD asks governments to report on 'legislative, judicial, administrative and other measures' which give effect to Article 5(e). This Article of the ICERD obliges states parties 'to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone' to economic and social rights, including the following: the right to work; free choice of employment; just and favourable conditions of work; protection against unemployment; equal pay for equal work; the right to housing; the right to public health; medical care and social security and social services; and the right to education and training.⁷⁴ The ICERD thus does not oblige a state party to protect these rights, but to make sure that discrimination with respect to the enjoyment of these rights does not occur.

In fact, Karl Josef Partsch asserts that CERD has been very cautious in its application of Article 5. The CERD has asked 'reporting states whether the rights listed in the article are guaranteed by their national legal systems, but it

⁷² WEDO, *Mapping Progress*.

⁷³ *Ibid.*, pp. 67-8.

⁷⁴ *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*, reprinted in Natan Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination* (Alphen aan den Rijn, The Netherlands: Sijthoff & Noordhoff, 1980), pp. 217-30.

has not indicated that the absence of such guarantees constitutes a failure to comply with the Convention'. The CERD thus seeks to establish whether these rights are protected in the state's legal order.⁷⁵

The ICERD, however, does not stop there, but also advocates state action to eliminate disparities and secure de facto equality.⁷⁶ Affirmative action programmes are authorized in both Articles 1 and 2(2) of the ICERD. Article 2(2) states:

States parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.

However, as with the ICEDAW, there is a tension here between equal treatment (obligation of means) and equal outcome (obligation of result). According to Theodor Meron, the CERD regards equality of result as the principal objective of the Convention. In a major policy statement, the CERD states that ICERD aims 'at guaranteeing the right of everyone to equality before the law in the enjoyment of fundamental human rights, without distinction as to race, colour, descent or national or ethnic origin, and *at ensuring that the equality is actually enjoyed in practice*' (emphasis added).⁷⁷

ICERD intends to address de facto as well as de jure equality. Legal equality is only the first step toward authentic social equality. The preamble refers to the enjoyment of human rights 'without distinction of any kind'; Article 5 demands the right to equality before the law; Article 1(4) allows for distinction for the purpose of affirmative action 'to ensure... groups or individuals equal enjoyment or exercise of human rights'. Combined with the Article 2(2) endorsement of affirmative action, this demonstrates that the ICERD promotes not just de jure but de facto equality, not just colour-neutral values but racial equality. States are required in Article 2(1) to take policy measures and eliminate any laws or regulations that have the effect of creating or perpetuating racial discrimination.⁷⁸

Economic and social policies that have the effect of perpetuating the disadvantaged position of certain racial groups must be remedied. The costliness or burdensome nature of such actions cannot be used as excuses for inaction. The goal is the equal development of all citizens.

States parties are required to submit an initial report within one year of the entry into force of the ICERD, and periodic reports at two-year intervals. Since 1989 the CERD has nominated one of its members to serve as a country

⁷⁵ Karl Josef Partsch, 'The Committee on the Elimination of Racial Discrimination', in Philip Alston, ed., *The United Nations and human rights* (New York: Oxford University Press, 1992), p. 360.

⁷⁶ See Drew Mahalic and Joan Gambée Mahalic, 'The limitation provisions of the International Convention on the Elimination of All Forms of Racial Discrimination', *Human Rights Quarterly* 9, 1987, pp. 82-3.

⁷⁷ Theodor Meron, 'The meaning and reach of the International Convention on the Elimination of All Forms of Racial Discrimination', *The American Journal of International Law*, vol. 79, 1985, p. 287.

⁷⁸ *Ibid.*, pp. 288-9.

rapporteur for each report. The CERD makes recommendations during the reporting process on the basis of its examination of country reports. Since 1972, the CERD has invited states to send representatives to respond to questions by CERD members. This procedure, not foreseen in the treaty, has subsequently been adopted by all treaty bodies.⁷⁹

Article 14 of the ICERD establishes an individual complaints system. However, as of September 1995 out of the 143 parties to the Racial Discrimination Convention, only 21 states had accepted this complaints system, and CERD had received only five communiqués.⁸⁰

Economic human rights and structural violence

It is undoubtedly true that more progress has been made in the area of economic and social human rights by development organizations than by human rights organizations. Economic and social rights have been a low priority within both the UN human rights machinery and the NGO human rights networks. This perhaps should not be surprising. Seen only as individual entitlements, human rights are a difficult conceptual framework from which to tackle structural violence in the global economy. Structural violence refers to the denial of subsistence rights to the most vulnerable sectors as a result of the joint workings of individual actions and social institutions. These economic and social human rights violations are often unintended and unanticipated. It is more difficult to shame agribusiness, the WTO or free trade than it is to point a finger at a brutal dictator torturing prisoners. A framework of legal positivism is particularly limiting, as there are few judicial remedies for victims of structural violence. Perhaps judicial remedies are not the answer for victims of development induced violations. Perhaps instead we should focus on economic policies and political remedies that challenge and reform these economic structures.

Economic and social rights create obligations for governments to enact policies and measures that create the proper environment for these rights to flourish. The duty of citizens and governments is to support the policies, institutions and agencies that meet these social needs. These are legal obligations and not simply altruism. Ensuring the economic and social rights found in human rights law requires states to guarantee that all public and private actors respect these norms. States are bound to respect, protect and fulfil economic and social rights.

In this era of economic globalization, is the state still able to fulfil these obligations? On the one hand, globalization has diminished the ability of all states to control economic outcomes that affect the well-being of their citizens. New global economic power centres challenge state sovereignty over economic resources including capital and labour markets. On the other hand, states

⁷⁹ Allan Rosas and Martin Scheinin, 'Implementation mechanisms and remedies', in Asbjorn Eide, Catarina Krause and Allan Rosas, eds, *Economic, social and cultural rights: a textbook* (Dordrecht: Martinus Nijhoff, 1995), pp. 359-60.

⁸⁰ Steiner and Alston, *International human rights*, p. 560.

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remain the central actors in economic planning even as they are often pounded by these forces of economic globalization. Although their economic power has diminished, they still can enact policies to respect, protect and fulfil economic and social rights. The legal positivist approach has (perhaps surprisingly) continued vitality in this economically interdependent world system.

Globalization thus reveals:

- the growing irrelevance of state power, and
- the growing relevance of state power.

The growing irrelevance of state power

As noted, the first paradox about the legal positivist approach to economic and social human rights concerns the role of the state in this era of globalization. On the one hand, it remains true that in most of the world the state remains the most viable actor in international politics. On the other hand, throughout the world the state's authority and supremacy has been undermined by forces which it cannot control. The state's power is particularly circumscribed in the economic arena. The promotion and implementation of economic and social rights cannot be solely limited to the realm of the state. In this new era, the specific areas of state responsibility for economic and social rights must be related to actual state power. Other actors with more economic power than the state must also be held accountable for the protection of economic and social human rights.

The forces of economic globalization are perhaps causing more fundamental transformations of our planet's economic and social life than at any time since the Treaty of Westphalia in 1648. The Treaty of Westphalia marked the emergence of the nation-state as the primary sovereign unit in international relations. James N. Rosenau characterizes this current period as one of 'postinternational' relations, by which he means that the world system can no longer be solely or primarily categorized as consisting of relations between nations.⁸¹ He coined a new word 'fraggation' to capture the dual process of global integration and global fragmentation. He hopes that this label 'highlight[s] the large extent to which the global system is so disaggregated that it lacks overall patterns and, instead, is marked by various structures of systemic cooperation and subsystemic conflicts...'.⁸²

The ideological principles underlying economic globalization include: the primacy of economic growth; the opening of borders to capital movements; the removal of all restrictions on trade; the removal of government regulations which infringe on the market; the promotion of voracious consumerism; and the elevation of the transnational corporation (TNC) as the key actor in worldwide development. New technology has allowed these ideological

⁸¹ James N. Rosenau, *Turbulence in world politics* (Princeton, NJ: Princeton University Press, 1990), p. 10.

⁸² James N. Rosenau, *Along the domestic-foreign frontier: exploring governance in a turbulent world* (Cambridge: Cambridge University Press, 1997), p. 38.

principles to be rapidly implemented. As a result of this globalization process, the state's power has to a significant degree been weakened in the economic and social realm.

The UN as an organization of states embraces Westphalian principles of sovereign power in its charter.⁸³ Law creation at the UN revolves around measures to hold states accountable to international standards. The international human rights movement to a large degree has operated within this framework. The profound implications of the globalization process have not been adequately addressed through a prism of positivist international law. To be concerned about protecting international economic and social rights means expanding the focus beyond the state to other actors as well. The human rights framework must also transform itself to address this new world.

There is a destructive side to globalization that is hard to ignore. The UN Development Programme (UNDP) documents the rising poverty, homelessness, landlessness, violence and levels of anxiety about the future around the world. The UN Environmental Programme documents the breakdown of our natural world as evidenced by global climate change, species loss, ozone depletion and air, soil and water pollution.

Examine, for example, two critical economic assets necessary for generating income and production: land and capital. Three-quarters of the world's income-poor depend on agriculture for their livelihood. According to the UNDP, about a quarter of the rural poor are landless or do not have adequate security of tenure or title. Furthermore, even those who have land often have holdings too small or unproductive to provide any security. Capital is necessary to take advantage of market opportunities such as investments in small business or using new farm equipment. Credit can help families through crisis without having to resort to other measures such as taking children out of school. According to the UNDP, only 2–5 per cent of the 500 million poorest households in the world have access to institutional credit.⁸⁴

What has globalization meant for the LDCs? UN statistics reveal the following.

1. Two-thirds of all foreign direct investment goes to only eight developing countries. More than one-half of all developing countries receive none.
2. In the 1990s real commodity prices were 45 per cent lower than those in the 1980s, and 10 per cent lower than the lowest level during the Great Depression.
3. Over the last 25 years the terms of trade for the least developed countries have declined by 50 per cent.

⁸³ For example, UN Charter article 2(7): 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter.'

⁸⁴ United Nations Development Programme, *Human development report 1997* (New York: Oxford University Press, 1997), p. 62.

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4. The final result of globalization is startling. The share in global income of the poorest 20 per cent of the world's people now stands at 1.1 per cent, down from 1.4 per cent in 1991 and 2.3 per cent in 1960. The ratio of income of the top 20 per cent to that of the poorest 20 per cent rose from 30: 1 in 1960, to 61: 1 in 1991 and to a new high of 78: 1 in 1994.⁸⁵

Jose Bengoa, the Special Rapporteur for the UN Commission on Human Rights, maintains that since bad income distribution is always linked to poverty, a more equitable distribution of wealth is key to the full enjoyment and realization of human rights. Thus, he argues, income distribution should become an economic and social indicator used by the WB, the IMF and the UNDP. The globalization of poverty will only worsen if these devastating trends are not altered.⁸⁶

In May 1998, the CESCR issued a statement on globalization and economic, social and cultural rights. The CESCR noted ways in which globalization is detrimental to and incompatible with economic and social rights. The right to just and favourable conditions of work, for example, is threatened by an excessive emphasis upon competitiveness. The right to social security is relegated to the private sphere providing no security to the aged. Cuts in basic health care and education for the poor are made in the name of fiscal responsibility to meet multilateral structural adjustment requirements. The CESCR calls for a 'renewed commitment to respect economic, social and cultural rights' in the midst of these global forces.⁸⁷

In this era of globalization, how do states fulfil their obligations in the Maastricht Guidelines to 'respect, protect, and fulfil' economic and social rights?

The growing relevance of state power

What is the state to do in these conditions of extreme vulnerability and sensitivity to global economic forces it is unable to control? Should the state continue to be the focus of efforts to address violations of economic and social human rights? What realistic expectations can be placed on the state to uphold and implement policies and programmes to fulfil the duties required by international economic and social human rights law?

While all economic actors whose actions have an impact on the lives of the most vulnerable sectors (including TNCs and IFIs) must be held accountable to economic and social human rights law, the state still remains the key player with the power to respect, protect, and fulfil. Economic globalization is not an excuse for a government to shirk its legal duties under international law to carry out its social and economic obligations. Furthermore, slowdowns in economic

⁸⁵ UNDP, *Human development report*, p. 9.

⁸⁶ Jose Bengoa, 'The silence of the innocent: the rights of the poor and excluded', *Social Development Review* 2: 3, September 1998, pp. 4-5.

⁸⁷ Statement by the Committee on Economic, Social and Cultural Rights, 'Globalization and economic, social and cultural rights', May 1998 (<http://www.unhchr.ch/html/menu2/6/cescrnote.htm>).

growth, drops in commodity prices that have a negative impact on export earnings and even natural disasters cannot justify a refusal to protect the most vulnerable.

At this point we must move beyond human rights law and legal positivism to the realm of international political economy. The legal approach to guaranteeing these basic subsistence rights can only take us so far. To understand why a state has these legal duties, even in times of recession and natural calamity, it is vital to examine the economic policies that can be utilized to meet these responsibilities.

In the midst of the overall negative trends in income distribution as a result of globalization (outlined above) there are some success stories. In fact there are a number of key economic lessons that can be extrapolated from these cases which point to the continued centrality of the state in economic policy making. Despite the claims of neo-liberal economists, there is no universal blueprint that states can follow to guarantee growth, equity and justice in their development model. But there are policies which can be utilized to meet the obligations found in international law to protect, respect and fulfil and, by so doing, shield the most vulnerable.

One of the most striking facets of UN statistics is that the link between meeting basic human needs and economic growth is often not very close. Human development continues to advance around the world despite economic decline and a worsening GNP. This was even true in the 1980s, the 'lost decade', which had a devastating impact on the lives and living standards of one and a half billion people. The 1980s were marked by drops in incomes and living standards more severe in most cases than anything experienced in the Great Depression of the 1930s. Yet, despite these conditions, in two-thirds of the developing countries there was an acceleration in the rate at which child mortality was reduced. Richard Jolly writes: 'For nearly 70 countries, child mortality was reduced at a faster rate in the 1980s than in the 1960s or 1970s. Moreover, the regions with acceleration in the rate of reduction of child mortality were the regions of economic decline—while countries with slow rates of improvement in child mortality were those of accelerating economic growth.'⁸⁸

One can conclude that there is no reason to wait for improvements in economic growth to attack child mortality, or other dimensions of social development, such as expanding basic education, access to clean water and sanitation and improvements in nutrition. We need to link economic policies of social development to the duties of states to meet their legal obligations in economic and social human rights law.

The Human Development Report attempts to quantify key elements of social development in its well-known index. The human development index measures a country's achievements in life expectancy, education and literacy

⁸⁸ Richard Jolly, 'Profiles in success: reasons for hope and priorities for action', in Santosh Mehrotra and Richard Jolly, eds, *Development with a human face: experiences in social achievement and economic growth* (Oxford: Clarendon, 1997), p. 8.

and basic income.⁸⁹ Paul Streeten details social development as a three-dimensional process: (a) social services (health, education) and social transfers (social security, safety nets); (b) economic access and productive returns (livelihood generation and employment); and (c) social integration (peace, absence of violence).⁹⁰ The UN Summit of Social Development in 1995 focused on three aspects—poverty, unemployment and social integration.

It is now abundantly clear that social development can occur despite low income levels and limited industrialization and modernization. Low-income countries can achieve levels of health and education comparable to industrialized states. The low-income success stories include Sri Lanka, Kerala (India), Botswana, Zimbabwe, Barbados and Costa Rica. In all cases, public action for social development was a priority regardless of the pace of economic growth. Countries made social development a priority and implemented necessary policies.

Santosh Mehrotra outlines the common successful policies of these countries as including:

- (1) state supported basic public services;
- (2) investment in health and education before economic take-off;
- (3) resource allocation to health and education well above the average for developing countries;
- (4) investment in basic education which preceded the improvement in the health status;
- (5) interventions which favoured the status of women;
- (6) attempts at ensuring a nutritional floor for the population; and specific health and education interventions to ensure the effectiveness of these services.⁹¹

As noted above, resource scarcity does not relieve the state from meeting minimum obligations, including minimal levels of essential foodstuffs, primary health care, basic shelter and housing and basic education. If the state of Kerala, with one of the lowest rates of economic growth and very little industrialization amid a decline in agricultural production, can still ensure access to basic health care and primary education to all its citizens, then there is absolutely no reason why other states cannot equally guarantee the economic and social human rights of their people.

Despite a much larger per capita income, Brazil still has a lower life expectancy than Sri Lanka. Why? Because Sri Lanka implemented a successful public action plan for social development. Botswana managed to increase life

⁸⁹ See United Nations Development Programme, *Human development report 1998* (New York: Oxford University Press, 1998).

⁹⁰ Paul Streeten, et al., *First things first: meeting basic needs in developing countries* (New York: Oxford University Press, 1981).

⁹¹ Santosh Mehrotra, 'Social development in high-achieving countries: common elements and diversities', in Santosh Mehrotra and Richard Jolly, eds, *Development with a human face* (Oxford: Clarendon, 1997), p. 29.

expectancy for its population from 48 years to 67 years and Mauritius from 60 to about 70 years.⁹² The CESCR is absolutely correct in its evaluation of resources and rights. The lack of resources should not be an excuse to fail to implement public policies to protect and provide basic economic and social human rights.

A key component of the success stories in human development has been the education of women. Amartya Sen has written of the notion of women's agency, for example, the freedom women have to engage in work outside the home, receive an education, have ownership rights and earn an independent income. When these economic and social rights are protected, women's well-being is enhanced.⁹³ Mehrotra demonstrates the links between female adult literacy and positive health outcomes. High education indicators preceded health breakthroughs. The education of women strengthened their earning capacity, their caretaking capacity and their control over resources. 'Women's resource control and caretaking capacity comprise one of the conditions for adequate nutrition, along with household food security, access to health services and a healthy environment... Maternal literacy and schooling is known to be associated with a more efficient management of limited household resources, greater utilization of available health services, better health-care practices, lower fertility and more child-centred caring behaviour. Moreover, it raises the awareness of the means to overcome problems and generates effective political demand. In general, therefore, women's education has an enormous effect on nutrition and health, in the long run probably one of the most important.'⁹⁴

Countries that were committed to a programme of social development dedicated approximately 5–8 per cent of their GDP to health and education.⁹⁵ Defence expenditures were not significant in most of the high-achieving countries.⁹⁶ Throughout the crisis of the 1980s, government expenditures in health and education as a proportion of GDP held up in all these countries. The global economic recession and structural adjustment did not interrupt macro-economic priority given to health and education.⁹⁷

These conclusions were further confirmed in the 1998 Social Watch report published by the Instituto del Tercer Mundo in Montevideo, Uruguay. Social Watch is a transnational coalition of organizations which gathers data on governments' compliance with their commitments from the 1995 Copenhagen Summit on Social Development and the Beijing Women's Conference. Their country-by-country analysis and Index of Fulfilled Commitments provide useful information to assess methods of meeting economic and social human rights. These reports demonstrate again the importance of public policy and

⁹² Mehrotra, 'Social development', p. 32.

⁹³ Amartya Sen, 'Agency and well-being: the development agenda', in Noeleen Heyzer with Sushma Kapoor and Joanne Sandler, *A commitment to the world's women: perspectives on development for Beijing and beyond* (New York: UNIFEM, 1995).

⁹⁴ Mehrotra, 'Social development', p. 40.

⁹⁵ *Ibid.*, p. 41.

⁹⁶ *Ibid.*, p. 48. See also: William F. Felice, 'Militarism and human rights', *International Affairs* 74: 1, January 1998.

⁹⁷ Mehrotra, 'Social development', p. 49.

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investment in human capital in any strategy to alleviate poverty. Public spending on health and education are again proven to be key ingredients to successful social development. Strategies that stressed the full utilization of human resources proved to be a sound path to poverty reduction.⁹⁸

Compare Costa Rica and Mexico. Costa Rica has a tradition of universal coverage of basic social services. Even in economic recessions, suitable allocations for preventive health care and primary education are made so that these services continue to reach the poor effectively. Mexico has no such tradition. Instead, health expenditures focus on curative (not preventative) measures and spending is geared to higher education. The Social Watch report further documents the ways in which Costa Rica supports labour-intensive development in agriculture and tourism that effectively integrated peasants and unskilled workers into the formal economy. Mexico, on the other hand, is now strongly dependent on foreign capital, employment in agriculture and manufacturing is unstable, sustainable development seems out of reach and poverty reduction strategies have failed.⁹⁹

The example of Costa Rica reaffirms key lessons from South-East Asia. Most observers have concluded that the rapid reduction of poverty in South-East Asia was fundamentally due to public provision of social services including public education and basic health care. Compare this success in human development in South-East Asia with their peers in South Asia. The poor in South-East Asia have improved opportunities to escape poverty compared to the poor in South Asia.

The same conclusions can be drawn from Africa. North African countries were better able to reduce poverty through policies that embraced a commitment to essential social services. A focus on public spending on education and health had a positive impact. In Sub-Saharan Africa, on the other hand, these policies were insufficient or applied too late.¹⁰⁰

Constanza Moreira concludes that 'labour-intensive growth combined with expanded access to basic services is the best guarantee for egalitarian growth. Experience shows that support for building *human capital* (reallocation of public spending to health and education services), for the development of sectors where poverty is concentrated, and for labour-intensive growth models contributes to a positive result when dealing with poverty reduction.'¹⁰¹

The legal positivist approach to international economic rights may be correct in focusing attention on the role of the state. It is clear that the state must take the lead in promoting social development. Economic growth, poverty reduction and social development cannot be left to the whims of the market and the forces

⁹⁸ Instituto del Tercer Mundo, *Social Watch Report No. 2* (Montevideo, Uruguay: Instituto del Tercer Mundo, 1998).

⁹⁹ *Ibid.*, p. 33.

¹⁰⁰ *Social Watch Report No. 2*.

¹⁰¹ Constanza Moreira, 'Strategies in the struggle against poverty, a comparative approach', in *Social Watch Report No. 2*, p. 35.

of globalization. The state can institute policies to address all aspects of human development. Human rights law can be used to hold states accountable to basic norms designed to protect human dignity.

Establishing a social clause in the WTO

One mechanism designed to hold states accountable to international economic and social human rights standards is a proposed social clause to the rules of the WTO. The goal of the social clause is to utilize positivist international law to require compliance with key ILO conventions by all members of the WTO. WTO membership and benefits would be contingent upon ratification and implementation of the social clause. The campaign to liberalize trade would be linked to a drive to eradicate brutal violations of working and living standards in all countries of the world.

The neo-liberal agenda calls for unrestrained access to global labour markets and labels attempts to establish fixed labour standards as nothing more than protectionism. Establishing minimum wages, neo-liberals argue, is an attempt to equalize differences in the costs of production between a domestic article and a similar foreign article that will take away incentives for investments in LDCs and thus shrink the world economy. The resulting stagnation and unemployment would cause much greater hardship for the working class and the poor than is currently the case in a world of free trade.

Critics of neo-liberalism, on the other hand, argue for fair trade and criticize current international economic structures that pressure countries to lower their labour standards and practise social dumping. Membership in the WTO requires that a country abolish the practice of dumping (actions by governments, such as subsidies and tax breaks, designed to artificially lower the price of an export commodity in order to undercut a comparable product abroad). By dumping cheaper export products into the market, the exporting country hopes to drive competitors out of business and capture the market. Social dumping is a similar phenomenon. A state utilizes unacceptable labour practices to lower the price of production and undercut competitors. These practices should also be banned under the existing rules of the WTO.

Erika de Wet argues that a social clause does not necessarily imply either protectionism or cost equalization. She uses the example of ILO Convention 131 on Minimum Wage Fixing to demonstrate how global standards work. This ILO convention is not an attempt to establish a uniform minimum wage across countries. Its intent is to establish the universal principle of a minimum wage. The ILO recognizes that it is unrealistic to expect comparable wages to be paid in the highly industrialized and less developed countries. The point of Convention 131, however, is to require every country to establish at least a minimum wage. This bare minimum demand will clearly not create cost equalization nor will it eliminate the competitive advantage of low wages and large labour pools in many LDCs. However, the hope is that it would prevent a

country from implementing a strategy to create competitive advantage by suppressing wages.¹⁰²

Possibly the key hurdle holding up progress toward implementing a social clause is disagreement over which economic and social standards should be included. The standards advocated by the International Confederation of Free Trade Unions (ICFTU), the World Confederation of Labour and the European Trade Union Confederation include: rights to freedom of association and collective bargaining (ILO Conventions No. 87 and No. 98), the prevention of forced labour (ILO Conventions No. 29 and No. 105), prohibition of discrimination (ILO Conventions No. 100 and No. 111) and the introduction of a minimum working age (ILO Convention No. 138). Other advocates add standards on occupational safety and health (ILO Convention No. 155) and a fixed minimum wage (ILO Convention No. 131).¹⁰³

The idea of enforcing these standards through universal or regional trading agreements has not moved forward. Developing countries, in particular, have opposed the social clause in the WTO. Some LDCs see this list of labour standards as disguised protectionism and an attempt to undermine their competitive advantage in lower labour costs. Furthermore, some LDCs argue that these universal standards are not sensitive to the specific cultural environment of a poor nation.

A number of these labour standards attempt to end the exploitation of children through the elimination of child labour. Yet, in some cases, working outside the home may be an attractive alternative, in particular to young girls. A 1998 report by Population Council researchers suggests that in some cultures child labour for young girls may actually prolong their adolescence. Working outside the home delays the birth of their first child, gives their reproductive systems time to mature and gives them some independence and self-esteem.¹⁰⁴

The use of child labour often involves brutal exploitation. Garment factory work in Bangladesh, for example, is low-paid and gruelling. Some 90 per cent of the factory workers are female and they range in age from ten to 19. A typical monthly wage for the youngest and most inexperienced is \$15. Yet the researchers conclude that despite this exploitation, female factory workers live better, more emancipated lives than their sisters who stayed behind in the villages. The girls working in the factory were not only able to support themselves, but learnt how to use complex machinery, worked alongside men and challenged authority by demanding higher wages. They were able to put off marriage and childbirth and overcome naivety and ignorance. They were thus liberated as well as exploited.¹⁰⁵

¹⁰² Erika de Wet, 'Labor standards in the globalized economy: the inclusion of a social clause in the General Agreement on Tariffs and Trade/World Trade Organization', *Human Rights Quarterly* 17: 3, 1995, p. 450.

¹⁰³ *Ibid.*, p. 453.

¹⁰⁴ Population Council, 'Female garment workers study in Bangladesh' (New York: Population Council, 1998), pp. 1-8.

¹⁰⁵ *Ibid.*, pp. 1-8.

Night work for women is another interesting example. The European Court ruled that the ban on night work for women violated the regulations guaranteeing equality of women. European governments were compelled to redraft laws forbidding such night work and distance themselves from the ILO Convention on this subject. Compare this decision to conditions in East Asia, where upholding the ban on night work for women is seen as a victory for the rights of women workers. In Europe the ban is seen as a denial of a woman's right to access to the same jobs as men. It is clearly not easy to draw up a list of universal social and economic rights.¹⁰⁶

Is it possible to develop clear universal economic and social human rights standards applicable to the widely divergent global community? Is it possible to draft a social clause that is responsive to the concerns of the working class and poor of the developed and underdeveloped worlds?

Conclusion: popular participation in the implementation of economic and social rights

In 1987 Philip Alston asserted that there is an identifiable 'minimum core content of each right that cannot be diminished under the pretext of permitted "reasonable differences"'. He wrote: 'The fact that there may exist such a core (which to a limited extent might nevertheless be potentially subject to derogation or limitations in accordance with the relevant provisions of the Covenant) would seem to be a logical implication of the use of the terminology of rights. In other words, there would be no justification for elevating a "claim" to the status of a right (with all the connotations that this concept is usually assumed to have) if its normative content could be so indeterminate as to allow for the possibility that the right holders possess no particular entitlement to anything. Each right must therefore give rise to an absolute minimum entitlement, in the absence of which a state party is to be considered to be in violation of its obligations.'¹⁰⁷

Alston is right—there is a minimum core content to economic and social human rights that the CESCR is valiantly struggling to refine and articulate. The CESCR has been able to criticize governments for violations of this core content (i.e. the criticisms of forced evictions in the Dominican Republic and Panama described above). All states have a duty to enforce these universal human rights. The Vienna Declaration of the UN World Conference on Human Rights states, 'while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and social systems, to promote and protect all human rights and fundamental freedoms'.

¹⁰⁶ Denis MacShane, 'Human rights and labor rights: a European perspective', in Lance Compa and Stephen Diamond, eds, *Human rights, labor rights, and international trade* (Philadelphia, PA: University of Pennsylvania Press, 1996), p. 52.

¹⁰⁷ Philip Alston, 'Out of the abyss: the challenges confronting the new UN Committee on Economic, Social and Cultural Rights', *Human Rights Quarterly* 9, 1987, p. 352.

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However, to move beyond merely denouncing violations, to actual implementation of a strategy to improve the working and living conditions of the most vulnerable sectors, must involve popular participation. The people whose economic and social rights have been violated should be a part of the implementation process. Universal standards must take account of local cultures and adjust to local conditions. This is not an argument for cultural relativism, but an argument for modesty and effectiveness. It is arrogant for any actor or any theory (e.g. neo-liberal economic theory or liberal human rights theory) to claim to know the best methods for every unique culture and society to implement economic rights progressively. Rather, to be effective, these approaches and theories must engage in what Abdullahi An-Na'im describes as a 'cross-cultural dialogue'. An-Na'im presents the need to verify and substantiate the genuine universality of the existing human rights standards through a process of retroactive legitimation. While existing human rights standards should be maintained, they should be respectfully implemented through a cross-cultural dialogue of mutual learning. Those of one cultural tradition 'must never even appear to be imposing external values in support of the human rights standards they seek to legitimize within the framework of the other culture'.¹⁰⁸

State action becomes decisive. The state has a duty to open up the space for popular participation. There is a link here between civil and political rights and economic and social rights. The African Charter for Popular Participation in Development stated this very well:

We believe strongly that popular participation is, in essence, the empowerment of the people to effectively involve themselves in creating the structures and in designing policies and programmes that serve the interests of all as well as to effectively contribute to the development process and share equitably in its benefits. Therefore, there must be an opening up of political process to accommodate freedom of opinions, tolerate differences, accept consensus on issues as well as ensure the effective participation of the people and their organizations and associations. This requires action on the part of all, first and foremost of the people themselves. But equally important are the actions of the State and the international community, to create the necessary conditions for such an empowerment and facilitate effective popular participation in societal and economic life. This requires that the political system evolve to allow for democracy and full participation by all sections of our societies.¹⁰⁹

Popular participation and cross-cultural dialogue is essential for the implementation of international human rights law governing child labour. The ILO Convention on child labour establishes that 'the minimum age ... should not be less than the age of compulsory schooling and, in any case, shall not be

¹⁰⁸ Abdullahi Ahmed An-Na'im, *Human rights in cross-cultural perspectives: a quest for consensus* (Philadelphia, PA: University of Pennsylvania Press, 1992), p. 5.

¹⁰⁹ International Conference on Popular Participation in the Recovery and Development Process in Africa, *African charter for popular participation in development and transformation* (Arusha, Tanzania, 1990), E/ECA/CM.16/11/Corr.1.

less than 15 years ... countries whose economy and educational facilities are insufficiently developed [are allowed] to initially specify a minimum age of 14 years and reduce from 13 years to 12 years the minimum age for light work.' It is critical to advocate this minimal standard as the abuse of child labour takes many forms including poor wages, long workdays, unhealthy working conditions, physical abuse and the lack of education. According to the ILO, 95 per cent of the approximately 200 million child workers around the world are in the less developed countries. Clearly the exploitation of children must end.

However, in a situation where children contribute needed income to their households, face increased poverty if they leave their factory job, and gain valuable vocational skills, the course of action becomes complex. Ending child labour must be combined with an overall programme to provide further options and opportunities to these children. If ending child labour means eliminating the primary vehicle through which literally millions of families avoid poverty, then an alternative road to paid work must be created. Accompanying the elimination of child labour must be a commitment to education, health care and job creation (for adults) so that these families have alternatives. All of which testifies to the importance of popular participation in this process. A top down directive from the UN CESCRC to less developed countries to abolish child labour will go nowhere. A grass-roots effort in the community to alter exploitative practices, on the other hand, has a chance of success. The ICFTU stated it most clearly: 'We seek a commitment to the progressive elimination of child labour as poverty is reduced and education expanded and prosperity rises.'¹¹⁰

Stephen Herzenberg has noted that the fight for minimum labour standards in the US did not simply revolve around an effort to abolish child labour, but around eliminating the sweatshop as a way of doing business. The overall strategy was to push business away from a reliance on low wages, high levels of physical effort and worker vulnerability. The strategy incorporated 'promotive, preventive and participative' standards, with the abolition of child labour as a key component.¹¹¹

The enactment of measures to enable people to exercise economic and social rights is vital. A legal positivist human rights approach has promise if it is combined with a strategy of popular participation. Universalism and localism need not be seen in opposition. Effective implementation of international economic and social human rights law depends upon its adaptation and acceptance by local communities.

Despite the shrinking nature of our global community, the state is still central in the creation of the proper environment for the fulfilment of these rights. The state can enact measures to respect, fulfil and protect basic human rights. The state can open up the political space so that popular participation can become a

¹¹⁰ Dan Cunliffe, 'The dangers of complacency in the face of a global social crisis', *Social Development Review* 2: 2, June 1998, p. 18.

¹¹¹ Stephen Herzenberg, 'In from the margins: morality, economics, and international labor rights', in Compa and Diamond, eds., *Human rights, labor rights and international trade*, pp. 100-101, 108.

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reality. And the state can regulate the activities of other transnational economic actors whose practices violate basic human rights protections.

Without the participation and involvement of the working class and vulnerable sectors of the South, attempts by the North to impose labour and environmental regulations will continue to be viewed with suspicion. This mistrust must be conquered. Workers in both the developed and developing countries have an objective interest in seeing the fulfilment of the UN's right to development and the full implementation of the ILO's basic human rights conventions. Perhaps through a cross-cultural dialogue on universal human rights standards, the historical legacy of mistrust between the North and South can be overcome.